Federal Jurisdiction in the Territories.

RIGHT OF LOCAL SELF-GOVERNMENT.

JUDGE BLACK'S ARGUMENT FOR UTAH

Before the Judiciary Committee of the
House of Representatives,
February 1, 1883.

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Following is the full text of the argument made by Judge Jeremiah S. Black before the Judiciary Committee of the House of Representatives, February 1st, 1883.

Mr. Chairman and Gentlemen of the Committee:

I am here with your permission and at the request of the people of Utah to discuss their rights and the powers of the Federal Government to control them.

If you think for a moment how much they may suffer by your legislation and remember that they have no vote in either House of Congress, I trust you will hear, without objection, the defence of their counsel, and permit him to show, if he is able, that the hostile measures proposed against them are unjust and unconstitutional.

Though I claim nothing for those people on the score of their merits, yet their behavior and character ought not to be misunderstood. It is said (with how much truth you know as well as I) that they are sober, honest, peaceable, upright and charitable, not only to one another, but to the stranger within their gates. The records show them to be singularly free from the crimes forbidden in the decalogue, and not at all addicted to the vulgar vices which often deform the character of frontier communities. Their Territorial government has been conducted with surprising purity, wisdom and justice. Simple in its machinery and impartial in its laws, its burdens

are light and its protection universal; no cheating at elections, no official defalcations, no special taxes, and not a dollar of public debt.

They profess almost universally a religion of their own, for which they are daily reviled and insulted; but they make no legal discrimination against the faith of those who dissent from them; there is no trace of intolerance in their enactments, and the constitution framed by themselves, and under which they ask for admission as a State, guarantees to every human being the most perfect freedom in matters of worship and conscience. Nowhere on earth has the value of local self-government been so strikingly attested by the success of the people who enjoyed it. Thirty-six years ago the valley of Salt Lake was the most forlorn and dreary region on the surface of the globe—a mere waste, which produced literally nothing. But under the stimulus of civil and religious liberty, these Mormons struggled against all the obstacles of nature. By a system of irrigation, amazing for its extent, ingenuity and cost, they brought ample supplies of water from the distant mountains down upon the plains, and by their persevering industry, they converted that rainless desert into a land of plenty, covered with fruitful farms and thriving towns.

I think that under these circumstances it would be an infinite pity to strike the Territory of Utah with the curse of political slavery, to deprive the people of their local government, and deliver them up naked and defenceless to be sacked and pillaged by their enemies. But let it be understood that I am not asking for mercy. If you have the constitutional power you must exercise it as you please.

There are many reasons which naturally incline an American statesman to do all the harm he possibly can to the people of Utah. They are powerless to resist it. They have not a single vote in the national legislature, and cannot exercise the slightest influence on a presidential election. They are excluded from all political rings; they cannot be anybody's competitor for the spoils of office; they can make or mar no scheme to save or squander the public money. On the other

hand, the whole country outside of their own Territory is populous with their enemies, whom you must conciliate and gratify if you can do so with a safe conscience, for they have votes and power and influence which will not be opposed without danger.

The religion which the people of Utah adhere to with so much tenacity, is regarded in other parts of the country with extreme dislike, as the mere superstition of an upstart sect. No man, however, who has the faintest perception of Christian principles, thinks it right to kill or plunder or outlaw them for holding an erroneous faith. From real Christianity there comes no howl for the blood and property of the Mormons. But in other quarters the most rancorous hatred breaks out. By some famous preachers the policy of killing the Mormons by wholesale, unless they leave their property, abandon their homes, and flee beyond the Union, is openly advocated and apparently concurred in with great warmth by congregations supposed to be respectable; and this is accompanied with curses loud and deep upon all who would interpose a constitutional objection to that method of dealing with them. When we read of such things in history, we are apt to think them diabolical. But, approved as they are now and here by popular judgment, and unrebuked even by senatorial wisdom, we must concede, I suppose, that it is very good taste and refined humanity disguised in a new dress. As a general rule, political piety, wherever it has turned up the whites of its eyes in this country or in Europe, is a sham and a false pretense, but in this exceptional case it would be speaking evil of dignities to call it hypocrisy. The soundness of the religion which slanders a Mormon is not to be questioned. Equally pure is the act of a returning officer who fraudulently certifies the election of an anti-Mormon candidate known to be defeated by a majority of more than fifteen to one, nor will we attribute any sordid motive to those residents of Utah, official and private, who busy themselves here and at home to break down the Territorial government, seize its offices, and grab its money. Their righteous souls are vexed from day to day by the mere fact that sinful men are allowed to live peaceful and

prosperous lives. They are animated solely by disinterested zeal for the advancement of the Lord's kingdom, which in their judgment would be much obstructed by the further continuance of free government in Utah.

But the case does not depend on the merits or demerits of the parties. It is not a question what measure of punishment the people of Utah deserve for their wickedness, but what Congress has a right to inflict. Whatever may be the superior sanctity of the holy men who promote this legislation, they cannot be gratified at the expense of a breach in the Constitution. If you shall be satisfied that you have no power in the premises, you will not usurp it; for that would be a hideous crime, of which you are wholly incapable. Before I go further, let me vindicate the justice of this censure, not because you doubt it (for that is impossible), but merely to stir up your pure minds by way of remembrance.

Mr. Grote, the most learned and thoughtful of modern historians, has shown by divers examples that fidelity to the fundamental law—which he terms *constitutional morality*—is the one indispensable condition upon which the safety and success of every free government must depend. The high career of Athens from the expulsion of the Peisistratids to a period after the death of Pericles—the marvel and the admiration of all time—was plainly due to the faithful practice of this supreme virtue. It was this that made the steady Roman strong enough to shake the world. England observes not only the theories, but the minutest forms of her constitution when legislating for her own people, and that has given her domestic tranquility and solid power at home; her shame and her misfortunes are all traceable to the disregard of it in dealing with colonies and outside dependencies. Constitutional morality was cherished and inculcated by our fathers, in the early ages of the Republic, as the great principle which should be the sheet-anchor of our peace at home and our safety abroad, and to the end that it might never be forgotten, they impose a solemn oath upon every legislator and every officer to keep it and observe it with religious care at all times and under all circumstances. In contrast with the self-imposed restraints of

the American democracy, Grote mentions the French, a nation high in the scale of intelligence, but utterly destitute of attachment to any constitution or any form of government, except as a matter of present convenience. You know what came of it—eleven revolutions in less than eighty years—a history filled with wrong and outrage—a people forever alternating between abject slavery and the license of ferocious crime.

It is plain as the noonday sun, that without constitutional morality every pretense of patriotism must be false and counterfeit. The man who says he loves his country, and yet strikes a fatal blow at the organic law upon which her life depends, shows his sincerity as Nero proved his filial affection when he killed his mother and mutilated her body.

A violation of constitutional law is not an offence which is ever made venial by the occasion. You cannot do evil that good may come. The evil is there, and the good never comes.

No matter how unimportant the breach may seem; though small at first, it will widen like a crevasse in the Mississippi, until the whole stream of arbitrary power goes rushing through it. Besides, the grade of a crime is not measured by the extent of the particular mischief. Forgery is forgery, whether the sum obtained by it be great or small, and murder is not mitigated by showing that the victim was short of stature.

It often happens that legislators, as well as other men, feel themselves hampered by such restrictions; but that does not authorize disregard of them. You cannot break lawlessly over the Constitution because it confines you to limits inconveniently narrow.

In this country all men and all classes are equal. No one can lawfully say to another, "Stand aside, I am holier than thou," and push him from his place on the platform of the Constitution. Superior sanctity is not a thing to be safely believed; it is easily simulated; it is often false; and when it comes into politics it is almost universally put on to cover some base and malicious design. The scribes and the Pharisees were hypocrites.

The party whose rights are injuriously affected by vicious acts of Congress outside of the Constitution may be weak and defenceless, the inhabitants of a distant Territory and the members of an unpopular sect whose complaint cannot reach the general ear, and would excite no sympathy if it did. But these are the very considerations which plead most strongly against the usurpation of ungranted power to destroy them. This is no appeal to your magnanimity, but a mere suggestion that the Constitution was made most especially for the weak.

We are not all agreed about the wisdom of the Constitution or the virtue of the men who made it; but whether you like or loath it, you are equally bound to obey it. You do not lessen this obligation one whit by railing at it. When you break it you do not diminish your guilt in the least by calling it an agreement with death, and a covenant with hell.

Nor can you change the nature or lessen the degree of the wrong by your own contemptuous feeling for the object. He may be altogether unworthy of your favor, but you owe him justice, and you must pay the debt to the uttermost farthing. A legal right is, in and of itself, a very respectable thing, however much you may hate and despise the man, or body of men, that sets it up.

Moreover: Constitutional morality means general morality in all things public and private, and the converse of the proposition is also true. Political power, under our system, is a trust given and accepted upon certain covenanted terms, and to be executed within certain limitations. A wilful breach of this trust by transgressing its limitations, perverting its purposes, or violating its conditions is an act of personal dishonesty which not only corrupts the officer who commits it, but demoralizes all other citizens who are tempted by their personal or party attachments to defend or apologize for the wrong. Thus the floodgates of iniquity are set wide open—all that is pure in morals, all that is perfect in politics, all that is holy in religion, are swept away; the public conscience swings from its moorings, the baser passions become masterless, and rapacity riots in the spoils of its lawless victories. If you are not satisfied with a free constitution, honestly obeyed,

give us a despotism, but save us from a rotten republic if you can.

I have not offered this feeble and faint support to the doctrine of constitutional morality because I suppose you to be against it, but for quite a different reason. I know very well that I am not addressing men who claim that their own resentments or their own interests are a higher law than the Constitution they have sworn to support, or a better rule of action than the law of God, which commands them to keep their oaths.

Let us see whether the measures passed and proposed against the Territory of Utah and its people are or are not open to objection on the score of immorality.

The constitutionality of the act of March 22, 1882, has been much and seriously questioned as an invasion of religious freedom. That is not my point. A mere sin against God, not affecting the relations of man to his fellow-man, false worship, heterodox belief, erroneous teaching, bad systems of ecclesiastical discipline; these are placed by our Constitution beyond the reach of human legislation. But any overt act detrimental to society in general or injurious to the public, may be forbidden by the State, and the offender cannot justify himself by showing that it is right according to his interpretation of the Divine will. A Jew believes it his religious duty to take the widow of his deceased brother and raise up children by her, though he has a wife and family of his own; but that is adultery by the law of the land, and he cannot nullify the law by pleading the revelation of Moses. A Seventh-day Baptist may be compelled for the temporal convenience of others to keep Sunday as a day of rest, though his conscience assures him that Saturday is the Sabbath of his God. One who has no faith at all is protected as well as one whose faith is wrong, but if the infidel insults or annoys his fellow-citizens by uttering his loose blasphemies at improper times and places, the law may check him with a penalty. It is sometimes difficult to see with certainty whether a particular act falls on one side or another of the line which divides the domain of conscience from that of the secular ruler. In

doubtful cases, the civil authorities have the right of decision, or, as Judge Gibson expressed it, the courts have the last guess.

My clients, or at least the leading teachers and jurists among them, are unshaken in the belief that marriage, being ordained of God and a sacrament of the Church, cannot be rightfully interfered with by the State. For the practical purpose of the present case it does not matter whether they are right or wrong about that.

Conceding the authority of the State, the question arises, who is the State? Where is the civil power to control them vested?

They assert that this power resides in their own government, and can be exercised only by their own legislature; that in this as in all things of purely local concern they are their own masters, with a perfect right to govern themselves. Therefore they hold that the forcible interference of Congress in such affairs, whether it be or be not an invasion of their religious freedom, is beyond all doubt a plain and palpable infraction of their civil liberties.

The opposing theory carried out to its logical consequences is that they are not a free community but a body of mere slaves, subject in all matters of every kind to the will of Congress; a body in which they have no representation, and composed of strangers, perhaps of enemies, who will take pleasure and give pleasure to their constituents, by the most injurious legislation they can invent against the people who are subject to it. The underlying question is, therefore, that of jurisdiction, which you are obliged to determine before you can know whether you are passing a law or merely disgracing the statute book by an act of gross usurpation. If it be *ultra vires*, it is not only a violation of constitutional morality, but as void as an ordinance on the same subject passed by the directors of a private corporation.

Perhaps it may be worth while to enquire for a moment how this conflict of jurisdiction came about. It started thus: The Mormons, being successively driven out of Ohio, Missouri and Illinois, took their religion with them to the wilderness of Utah. To us it is false. But that is truth to them

which they believe to be true. Their faith in their own creed is proved by their works and sealed with more suffering than any other sect in modern times has ever endured. It is all nonsense to doubt their sincerity. Nobody does doubt it.

It is a part of this religion that plural marriages are in some cases righteous and proper. Their Church teaches that, and they made no laws to punish its members for acting according to their belief. This simple forbearance of their government to fine and imprison people for doing what they all believed to be right is the head and front of their offending. How could any sane person expect them to do anything else? They had the misfortune to believe implicitly and almost unanimously as an article of religious faith that polygamy was not wrong. How could they make it a penal offence without subverting their civil institutions? You might as well ask a people to punish one another for their complexion, the color of their hair, or the shape of their bodies common to, and admired by, all. They simply could not either make or execute such a law. As an organized community they must have perished if they had undertaken it.

Because they would not and could not take this destructive course they are supposed to be guilty of such heinous wickedness that they are hardly fit to live on the same planet with us.

The law which they could not make for themselves, because their judgment condemned it as unjust and impolitic, is now to be made for them and thrust down their throats "against the stomach of their sense." Their government refused to commit suicide; therefore it ought to be murdered.

The question whether you can constitutionally legislate on this subject involves the entire right of self government. It covers the whole ground between freedom and slavery. The formation of the family, marriage and divorce, the legitimacy of children, the succession to property, these are the most purely private, domestic and local of all subjects to which human legislation can apply; and if your right to control a people in these respects be conceded, there is nothing else on which your jurisdiction can be denied. You can

make your laws good or bad, as you please, and they are as binding one way as the other. That they will be very bad is not an idle apprehension; for you will be impelled by strong motives to legislate without the smallest regard for the rights, interests, wishes or feelings of the people concerned.

If you can forbid polygamy where it is believed to be right, you can force it on a community that holds it in detestation. You can divorce every man from his wife or wives, whether he has one or many. You can abolish the institution of marriage entirely, strip all men and all women of their conjugal rights, bastardize all their children, and bring on the reign of universal free love. If you can imprison, disfranchise and disgrace a man for marrying the woman he lives with, there is no reason (I mean no legal reason), why you should not patronize adultery and honor the brothel.

This omnipotent power of Congress, which makes and breaks the matrimonial contract, extends to all the relations of private life. That of parent and child necessarily goes with it; ancestor and heir follow, of course, and by parity of reasoning, master and servant are included. Then why not debtor and creditor, landlord and tenant, vendor and vendee? What shall hinder you to take away the testamentary power, forbid administration of a decedent's estate, regulate all business, and stop all work except what you and your constituents approve?

To carry into effect the laws already passed, it is necessary and proper that you should have a police force composed of spies and delators, who will thrust themselves into the kitchens and bedchambers of all families, employ eavesdroppers who will watch them at keyholes and windows, or in default of that, change the rules of evidence (as a committee of the Senate has actually proposed), and compel the lawful husband and wife to testify against one another in contemptuous defiance of the great principles which protect the sanctities of the family and lie at the basis of civil society.

It is perfectly clear that if your claim to exclusive jurisdiction be established, so as to comprehend the power to punish men and women for making family arrangements

which you disapprove, you have authority to define all offences; anything is a crime which you choose to call so, and everything is innocent which you think proper to tolerate. You may therefore make an entire criminal code for them, and you may make it as pernicious as you choose. It need not be "a terror to evil-doers, or a praise unto them that do well," if you wish to have it otherwise. The virtues may be visited with penalties; justice, chastity, temperance and truth may be sent to the penitentiary; swindling and perjury may be legalized. Taking the exceptional jurisprudence of Sparta as a model, larceny may become a merit, or following a more recent precedent in the congressional government of the South, you can maintain the worst men in the highest offices, throw the reins loose on the neck of rapacity, make leprous fraud adored,

> "Place thieves
> And give them title, knee and approbation
> With senators on the bench."

If you have not only the right, but the exclusive right, to do this, it must be acknowledged that there is no use for a local government; it is merely in your way, and accordingly you have already begun to abolish it. Agents appointed under your laws have gone down with instructions to take possession of all the polling places and registration offices, and the people were expressly forbidden to vote except by their permission and under their supervision. They construed your law as a bill of pains and penalties, which attainted the whole population, and they ordered every voter to be disfranchised who would not take an expurgatory oath that covered his whole life. Another set of agents assert that they have your direction to seize all the Territorial offices, and distribute them as booty among the enemies of the people. One more step, an easy and a short one, you are much urged to take, and that is to send a commission upon them, with power, not only to supervise them when they vote, and deprive whom they please of the ballot, but to make and execute all laws on every subject, and to govern them generally as an overseer might govern a plantation of slaves.

Of course it is possible that the Territory might be controlled justly, wisely and moderately by the hirelings of the Federal Government. But the chances are a thousand to one that they would act as persons in that situation have always acted—oppress and plunder their subjects, steal their money, and tax their industry to death. This might provoke the resistance of the most patient people, and the first symptom of disorder would furnish a legal excuse for cutting them up root and branch. Arbitrary rulers pardon nothing to the spirit of liberty.

Has Congress this exclusive power of legislation for a Territory? or does it belong to the people of the Territory and to the representatives whom they have chosen to entrust with it? I maintain that the right of local self-government is founded on acknowledged principles of public law; it existed before this government was framed, and the Constitution reserves it to the people of the Territories as distinctly as to the States.

Look at the practical case. Citizens of a State, or of several States, leave the place of their residence and go out with their families to colonize themselves on the public domain of the Union, beyond the limits of any State. They buy the land and settle upon it, with the consent of the general government, to which it belonged, whereby they become a separate body, detached from all others. Have they ceased to be free? Did they leave their liberties behind them? Have they not a natural right to regulate their daily lives and adjust their private relations by such laws as they think will be most suitable to their condition and best promote their interest? Yes, they have, unless they are slaves; for the freedom of the community results necessarily from the freedom of the individuals that compose it.

I do not assert that they can govern themselves in a way forbidden by the Federal Constitution, or by an act of Congress passed in pursuance thereof. The people of a State cannot do that. What I do assert is, that Congress cannot legislate for a Territory on any subject-matter on which it cannot legislate for a State. This furnishes an easy and infallible

test of constitutionality. If Congress may regulate marriage and divorce in a State, it may do so in a Territory; if not, not.

It is true, also, that the general government may give the colonists a charter, and call it an act of incorporation or an organic law. This was what the imperial government of England did for the several colonies that settled on its lands in America. But the charter must be a free one. If it abridges the liberty of the people to do as they please about matters which concern nobody else, it is void. Even if the colonists would consent, for a consideration, to accept an organic law imposing a restraint upon the right of self government, they could throw it off as a nullity; for the birthright of a freeman is inalienable. I need not say that foreigners naturalized are on a level with native citizens.

As Congress cannot give, so it cannot withhold the blessing of popular government in a Territory. But the legislation now proposed, in addition to that already passed, would blacken the character of the federal government with an act of cruel perfidy. The charter you gave to Utah was in full accordance with the broad principles of American liberty. You organized for them a free Territorial government, put into their hands all the machinery that was needed to carry it on; the ballot to be used under regulations of their own; officers chosen by themselves to administer their local affairs, collect the taxes and take charge of their money, and a legislature representing them, responsible to them, clothed with exclusive power to make their laws and to alter them from time to time, as experience might show to be just and expedient. Gilding your invitation with this offer of free government, you attracted people from every State and from all parts of the civilized world, whose industry scattered plenty over that barren region and made the desert bloom like a garden. Now you are urged to break treacherously in upon their security—supersede the laws which they approve by others which are odious to them; make their legislation a mockery by declaring that yours is exclusive; drive out the officers in whom they confide, and fill their places with raging and rapacious enemies; take away their right of suffrage, and with it all

chance of peaceable redress; break down the whole structure of Territorial government, under which you promised to give them a permanent shelter. Would not this be a case of Punic faith? Apart from all question of constitutional morality, the conduct of the wrecker, who burns false lights to mislead the vessel he wishes to plunder, does not seem to me more perfidious. If it has the same appearance to you, it will be swept away with the scorn it deserves. But let us keep to the point of law.

The relations of the colonies to Great Britain were precisely the same as those which exist between what we call the Territories and the general government of the United States. By the public law of the world, the colonies had the right of local self government. The imperial parliament, omnipotent at home, was utterly without power to legislate on the domestic affairs of any community settled upon crown lands sold or given to them on this side of the Atlantic. This freedom was not only asserted by the colonists, but for more than a century they were allowed to enjoy it without disturbance. The exclusiveness of their right to legislate for themselves, the extent to which it was exercised, and the range of subjects it embraced are known to all who have read their history.

In those days the doctrine of perfect religious freedom was unknown; it was regarded as a proper function of the civil authority to punish whatever it deemed false theology. This power, like others, belonged to the colonies. When heretics, proscribed in England by the laws in force there, fled beyond the sea and organized a colony, they not only escaped persecution, but acquired the right to persecute others. By some of the colonies the power was much abused; but the parliament could not interfere to prevent it. The king sent Lord Baltimore and a large body of his retainers to Virginia, with a grant of land and a letter to the colonial authorities, requesting that he might not be molested on account of his religion. The colonial legislature resented this as an interference with their established right of self government, and replied to the king that if Lord Baltimore practised the Catholic religion within their territory, he must submit to such penalties

as they chose to inflict. The royal mandate was withdrawn; Lord Baltimore was moved above the Potomac, where he and his friends erected a colony of their own, and that colony excited the disgust of parliament and the indignation of Virginia by tolerating all kinds of religion.

I mention these things to show that self government, in its broadest sense, was claimed by and conceded to the colonies. Then home rule extended to matters of religion as it did to all other affairs within the scope of the civil authority. Here and now the conflict between federal power and the rights of a State or Territory could not take that shape, inasmuch as legislation on such subjects is excepted forever out of the power of all government.

But suppose by a stretch of your imagination that parliament, led by some ultra tory, had undertaken to prescribe what family relations should exist in a particular colony, provide the severest penalties to enforce the regulations by penalties in direct conflict with the popular sense of duty and against pre-existing laws, customs and opinions. What would history have said about such a parliament? But suppose, further, that the same parliament, to remove impediments from the way of its act, broke down all the free institutions of the colony, forbade trial by jury, unless the jury was packed, disfranchised the legal voters, prevented elections that were not supervised by agents of the ministry, ordered the expulsion of all officers already chosen, and replaced them by avowed enemies, with power to tax and cheat them at will. Could such measures as these against any of the colonies have found one unprejudiced and honest defender in the world?

In fact, and in truth, nothing nearly so atrocious was proposed or attempted. The stamp act, the tax upon tea, the prohibition of certain manufactures, the Boston port bill, and other restrictions upon trade, were trifles in comparison. But they reached the vitals of civil liberty simply because they denied the principle of perfect home rule in the colonies; they asserted a jurisdiction in parliament which was inconsistent with the right of the colonies to govern themselves in matters which affected their own rights, interests and feelings. There-

fore those measures kindled a blaze of indignation in every colony. All true men in America pledged their lives, their fortunes, and their sacred honors to "throw off the shackles of usurped control," and in the outcome they did "hew them link from link." The friends of liberty in England sided with patriots here. Burke and Fox made the defensive sophistry of ministers contemptible, Chatham declared that if Americans submitted, they would become slaves themselves, and fit instruments to enslave others. "I rejoice," said he, "that America resisted."

If there be anything fixed, established, and undeniable as a proposition of public law, it is the natural right of a free community like Utah to govern itself. It is impossible for a member of Congress not to know that the success of our revolution was an acknowledged triumph of that principle. English and American supporters of Lord North's ministry may have been conscientious in their opposition to this doctrine, and upright statesmen may dissent from it now; but it is not easy to see how any man can believe in the rightfulness of these aggressions upon Utah, except for reasons which would have made him a tory, if he had lived in the time of the revolution.

I have said that these people have a natural right to govern themselves; but I admit that this natural right may be abridged by fundamental arrangement. That is to say, the right of legislation for a Territory upon some subjects or all may be taken away from the people and vested in Congress by the Federal Constitution. Would it not be a shocking surprise to discover in that instrument a provision so hostile to the liberty for which they had fought and toiled for seven years? You will find upon looking at the Constitution that it is not there.

But the unlimited sway which the power of exclusive legislation would give, has at different times in our history been much desired by members of Congress and by friends of theirs who cast their covetous eyes on offices and property which did not belong to them. Before the industry of Utah had made it rich enough to be worth robbing, the notion was

started that if the Southern States could be reduced to the condition of Territories, the absolute domination of Congress over them through the instrumentality of carpetbaggers and bayonets would become constitutional. Therefore, the first step was to declare that the State governments did not legally exist; the States were said to be Territories, and, as a consequence, supposed to be at the mercy of Congress.

Mr. Thaddeus Stevens, the great leader and driver of that day, who ruled Congress with a sway that was boundless, thought it best in the beginning to assure his followers that the Constitution had given to Congress this power over the Territories. To prove it he showed them the following provision:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

That this expressed nothing, and meant nothing, and granted nothing to Congress, except the power to exercise for the general government its purely proprietary rights over the land and goods it possessed, whether lying within the States or outside of them, was so perfectly manifest that Mr. Stevens became disgusted with his own argument; he freely expressed his profound contempt for it, and for all who pretended to believe it. Having drawn them into it by his glozing speech, his fierce invective lashed them out again; and he so "chastised them with the valor of his tongue," that they feared to speak of scruples any more. He did not, because he could not, furnish them any other pretense to stand upon; and he told them plainly and frankly that he would not stultify himself by professing to think his measure constitutional. "This," said he, "is legislation outside of the Constitution." It was passed, and Congress inaugurated the reign of the thief and the kidnapper by an acknowledged usurpation.

The outrages upon liberty in Utah are not grounded on the theory which Mr. Stephens exploded. It is not now pretended that the forcible rupture of private relations, seizure of

ballot boxes, disfranchisement of voters, expulsion of Territorial officers, are needful rules and regulations for the disposal or use of federal property. "The Edmunds bill" (which could not have been drawn by the Senator of that name) assumes and expresses the assumption in unequivocal words, that *the United States have exclusive jurisdiction in a Territory.* This is much worse than the other; it is not merely a false construction of the Constitution, it is an attempt to put into the Constitution what is not there.

When a man who knows anything about American institutions asserts that the United States have exclusive jurisdiction in a particular place, he means to say that the Constitution has given to the federal legislature and executive the sole authority to make and enforce all laws in all cases for and against all persons in that place. There are places in which this omnipotent and exclusive power is given to Congress, but to say that it extends to Utah or any other Territory is simply false. Look at the Constitution and see for yourselves. Among the enumerated powers of Congress is this:

"To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular States and the acceptance of Congress become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

There is the only grant of exclusive jurisdiction that can be found in the instrument. It is plainly intended to and does cover the District of Columbia. The authority is granted with equal clearness over the places occupied by the forts, arsenals, magazines and dockyards; but does it say that it may be exercised in the Territories? No; "it is not so nominated in the bond."

This is no point of interpretation, strict or loose. Whether the Constitution grants or does not grant the power of exclusive legislation over the Territories to Congress, is a question of fact to be determined by mere inspection. The ocular

proof that no such grant is there cannot be overcome or in the slightest degree weakened by any kind of construction, however smart, much less can the omission be supplied by a bald interpolation.

If the power is not given to Congress in and by the Constitution, then Congress has it not at all. This is a government of enumerated powers. It is part of the instrument itself that powers not granted are reserved.

Nobody has ever been mad enough to say that such laws as these against Utah could be enforced against a State. Why? Because the Constitution gives Congress no jurisdiction or authority to pass them. But it does give exactly the same power of legislation over a State as over a Territory. The right of freemen to be exempt from the scourge of the central power is, therefore, as well secured in one as in the other.

The powers not granted to the United States are reserved to the States respectively or to the people, and the enumeration of particular rights expressly retained does not disparage or deny others on which the instrument is silent. This being the express rule, it will hardly be asserted that the power now in question is not reserved. To whom is it reserved? To the States respectively where there are States, or in a Territory where no State government exists, there it is reserved to the people. The reservation is as clear and express in one case as in the other. In both the power of local self-government rests and remains where it was placed by God and nature, since it was not removed by the Constitution and lodged elsewhere.

The general government is a political corporation, with powers defined in its charter. Outside of the charter all its acts are void, as would be the similar acts of any other corporation. Suppose the directors of the Illinois Central Railroad Company, out of their pious regard for the moral and spiritual welfare of Chicago, would pass a law to reform the licentiousness, gambling, drunkenness, and other vices there supposed to be practised, imposing penalties of fine, imprisonment and disfranchisement upon all prostitutes and keepers of disorderly houses, would anybody be bound by their

statutes? Yet their power to pass them and enforce them would be just as good as yours to do the same thing, either for Illinois or Utah.

There are other objections to this legislation against Utah. It is not only *un*constitutional but *anti*constitutional. It assumes a power not granted, and then commands it to be enforced by means flatly prohibited. Let me call your special attention to some of them.

I. Trial by jury means by a jury of the country, the peers of the party, selected impartially from the general population, so as to represent a fair average of the public understanding and moral sense. That is the kind of jury that every man is entitled to have who pleads not guilty, and puts himself on God and the country for trial. That is the meaning of the word jury as used in the decrees of Alfred, the statutes of Edward the Confessor, Magna Charta, the Petition of Rights, the Bill of Rights and the American Constitution. In that sense it is used by all English-speaking peoples, and with that sense attached to it the institution has been adopted by other nations. The right of trial by jury is withheld by the Edmunds law, or given in a mutilated form, which makes it hardly better than a military commission, "organized to convict."

The body of the population believe as matter of moral and religious sentiment that polygamy is at least so far right that a law which makes it a penal offence is unjust and impolitic. The anti-popular faction, composing about one-twentieth, justify their machinations against the others by expressing a most violent antipathy to that particular feature of the prevailing doctrine which permits of plural marriages.

That is their religion, their politics, their business, their law; they carry it into everything; to them it is piety and patriotism; it stands in the place of faith, hope and charity; from among them, hardly numerous enough to be called a minority, the act of Congress arranges that the jury shall be exclusively made up; the country, the body of the people is not to be represented at all.

A juror may be questioned on his oath whether "he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman?" If he refuses to answer, or answers in the affirmative, he is conclusively presumed to be one of the people, and must be rejected; but if he replies "No," he has spoken the watchword of the inimical faction, and he is admitted, because his ascertained hostility to the party accused and all his class may be relied upon as an element of his verdict.

All officers concerned in a trial under this law are required to sift out the panel, and see that no one gets on who will not jump at every chance of conviction. The summoning clerk must be what is called in Philadelphia a "jury fixer;" your judges must bring themselves within the old statute against "evil procurers of dozens," that being the designation of certain persons who made it a business and a trade to find twelve men predetermined on a verdict desired by the party who employed them.

An attempt has been made and will be again to justify this unreal mockery of a trial by saying that unless you pack the juries you cannot get convictions. As matter of fact this may be true. Generally it is vain to hope that a jury of the country representing the popular feeling and sense of right will carry out to its bitter end a law regarded by the mass of the people, whether rightly or wrongly, as unjust, oppressive and cruel. That is why we have juries. For that reason trial by jury is the great safeguard of civil liberty. To make them efficient to that end they are judges of the law as well as the facts, and their verdict on both is conclusive. By the exercise of this power they have nullified tyrannical statutes many times. You cannot but remember the notable case of Woodfall, when the life of English liberty was saved at its last gasp, by the stubborn refusal of the jury to find a verdict according to the law of libel, as laid down by Lord Mansfield. The sentiments of the people were not consulted when you made this law, but you cannot evade their judgment upon it when it comes to be executed. They were not represented in

Congress, but they must be represented on the jury. The effort now made to substitute a packed jury for a jury of the country is a very poor attempt to defeat the most sacred right which the Constitution guarantees. I solemnly trust that it will turn out as impotent as it is unauthorized.

II. The promoters of the law in question, not satisfied with trying their victims by a court and jury composed of their enemies, concluded to go a little further, and punish them without any trial at all. The frightful penalty of disfranchisement is to be visited upon them without conviction. Men were directed to be stripped of their citizenship, rendered incapable of voting, expelled from offices to which they had been legally chosen, and deprived of all right to participate in the government they lived under for crimes of which they were never even accused before any legal tribunal. Commissioners are appointed to carry this out, who, reversing the presumption of law and declaring the whole population to be guilty, proceeded to convict individuals by a test oath of their own fabrication.

The right to do such things as these does not depend on the jurisdiction of Congress over the Territories. No matter how exclusive your power may be, you cannot exercise it in a fashion like that. The Supreme Court decided that the State of Missouri could not put such a provision in her constitution. It is a bill of pains and penalties, or bill of attainder, which is expressly forbidden by the Constitution. There is no legislative body on this continent that has authority by an arbitrary decree to deprive freemen of their civil rights for offences of which they are not judicially convicted. It is a burning shame that such a decree should be found among the acts of Congress.

If any man thinks that disfranchisement is not punishment, or that the judgment of an election officer is equivalent to a legal conviction, let him read the opinion of the Supreme Court of the United States in Cumming's case (4 Wall.) delivered by Judge Field, or the clear and unanswerable exposition of the subject given by Judge Strong, Huber *vs.* Reilly (3 Persifer Smith). If he does not believe on such authority

and such reasoning, he would not believe though one rose from the dead.

III. When I first read this law I did not believe that its supporters really wished it to operate upon any but persons who might be legally convicted of offences *thereafter* committed. The words are capable of that construction, and it is not fair, if it can be avoided, to suppose that a legislator intends to violate the Constitution. But the debates show that I was mistaken upon the matter of fact. The actual intent was to make it *ex post facto*. The Commissioners so understood it, and they were subservient enough to carry it out. They gave it a retroactive effect, which reached back for a whole generation, and laid its punitive lash not only on men who were never convicted, but upon men (and women, too) who could not be convicted because their offences were condoned, because they were protected by the statute of limitations, or because they had been already tried and acquitted. Nothing was a defense against this iniquitous act, which suddenly, without warning or trial, reached back, like the terrible hind hand of a gorilla, and throttled all that it grasped. An argument certainly cannot be necessary to prove that this is an outrage on the Constitution as well as on the principles of natural justice.

IV. But the pains and penalties of disfranchisement are to be carried still further. By the laws of Utah the right of suffrage belongs to women as well as men. It was bestowed upon them formerly and rightfully by the territorial legislature, with the consent of the United States expressed by the governor, who had an absolute veto. There is no kind of doubt about the right being legally vested. This is so clear and unquestionable that the Federal judges themselves, with every inclination to exclude them from voting, were compelled to decide that it could not be done. Of this acknowledged right it is now proposed to deprive them by a bill of pains and penalties, not grounded upon any pretence of guilt, but coupled with an admission that the suffering parties are perfectly innocent.

It will hardly be pretended that the rights of a woman

when once legally vested are less sacred than those of a man, or that he more than she is protected by the Constitution against the wrath and malice of political rulers. If the male voters of Utah are free men, the females are free women. One is no more subject to be disfranchised by a bill of pains and penalties than the other. Can either of them be so treated?

The right of suffrage is part of a voter's property. Its value is inestimable, because it is the right preservative of all other rights. You cannot deprive him of it without due process of law. You can as well make a legislative decree to take the lands and goods of these men and women in Utah as take the ballot from them. The ballot is especially valuable to them at this moment as their only weapon of defence against the enemies who are prowling around them to capture their government and use it as an engine to plunder and oppress them. The security, not of their liberties only, but of their peace, property and lives, depends upon their being able to keep it. The sin of these otherwise virtuous and innocent women has consisted solely in voting to sustain honest government against the rapacity and fraud which seek to overthrow it.

V. The end and object of this whole system of hostile measures against Utah seems to be the destruction of the popular rule in that Territory. I may be wrong—for I can only reason from the fact that is known to the fact that is not known—but I do not think that the promoters of this legislation care a straw how much or how little the Mormons are married. It is not their wives, but their property; not beauty, but booty, that they are after. I have not much faith in political piety, but I do most devoutly believe in the hunger of political adventurers for spoils of every kind. How else can you account for the struggles they are now making to get possession of all the local offices in the Territory, including the treasurer, auditor, and all depositories of public money? If they do not want to rob the people, why do they reach out their hands for such a grab as this?

If you will look at what is called the Hoar amendment,

consider how it came to be put into the appropriation bill of last session, and reflect upon the nefarious claim which the governor and his adherents are now making under it to despoil the people of the local offices which they alone have the right to fill, you will be forced to the conclusion that the public liberty of no people has ever before been so shamelessly assaulted. I do not say that the claim is sustained by the law, or that Congress had any intention to authorize the robbery, for I am satisfied of the contrary; but the animus of the anti-popular faction is revealed by the whole transaction in a light that utterly discredits it.

Legally it makes no difference what was the ultimate purpose of those who instigated this political enterprise. But will you, as friends of the Constitution—could you, even if you were its enemies—say that Congress has power to decree the removal of territorial officers, and direct their places to be filled by others? Even if you could justify the outrage upon the people of removing the agents to whom they have entrusted their money and their business, and forcing upon them others in whom they have no confidence, what right have you to deprive individuals of their property without due process of law? Their offices are property in which, like their goods and lands, they have a legally vested estate. The Hoar amendment is construed (falsely, I admit) as authorizing all these offices to be seized, and used as a means of forcing the people to maintain their enemies and pay them salaries for any acts of oppression and fraud which they may choose to perpetrate.

Do not charge me with overstating the danger to which the Territory will be exposed if its government shall be captured by those who are now trying to take it. The experience of the whole world in all time shows that the want of home rule is the want of everything else that is honest and fair. Rulers forced upon a people are never just. It is as certain as the rising of the sun to-morrow that if the people are put under foot they will be trampled down without mercy. And their total destruction will be accomplished very soon. They cannot stand what South Carolina did; there is no "ten years of good stealing there."

VI. No reasonable man can justify or even excuse such enactments as those proposed in the new bill now pending before you, unless it be assumed that the people of Utah have no rights that a white man is bound to respect.

It appoints a commission to perform the functions of the legislature and to redistrict the Territory. The apparent purpose of this is to gerrymander the district so as to give the minority control of the legislative body. With a majority of nearly twenty to one, the commission will find the way to that object so steep and crooked that they scarcely can hope to reach it. But the cunning man who drew this bill inserted a provision that the "existing election districts and apportionments of representation concerning members of the legislative assembly *are hereby abolished.*" There can be no election at all for members of the legislature unless new districts are made by this commission. By simply declining to act it can extinguish the territorial legislature altogether. That was the very trick by which the election of the territorial officers was defeated last August. The Edmunds bill declared that all registration and elective offices should be vacant until they were filled by appointments of certain commissioners. Those commissioners would not make any appointments until after the time for holding the election had passed, and so there was no election. To expect that the same game will not be played over again requires the charity that believeth all things. This bill would put the extinction of the territorial legislature into the power of a single member of the commission, for the redistricting is to be done, not by a majority, but by all, and a dissent of one would make the action of the others inoperative.

It would be wearisome to say what might be said about those parts of this bill which authorize a person to be kidnapped and held as a witness who has not been subpœnaed or notified, its subjection of private papers to unreasonable searches and seizures, or the inhuman disregard which it shows of family feeling and the sanctities of private life by compelling men and women lawfully married to testify against one another.

VII. These enactments made and proposed are in the main a comprehensive bill of pains and penalties, not against persons guilty or supposed to be guilty of polygamy or any other hurtful crime, but against people known and acknowledged to be innocent. They are intended to disfranchise whole masses of free persons, reduce them to the condition of slaves, and deprive a community of its natural and constitutional right to an honest government of its own. For such a bill there is not only no warrant in the Constitution, but it is expressly interdicted. Nor is there any precedent for it except the reconstruction laws of 1867, and they were admitted to be unconstitutional by their author and by the counsel who undertook to defend them, and to my certain knowledge they would have been declared void by the Supreme Court in the case of McArdle, if we had not been circumvented by an act of Congress taking away the jurisdiction. It is true that they were made effectual, but it was done by the Fourteenth Amendment. The opponents of free government in the South, knowing that Congress had no such power, forcibly injected their bill of pains and penalties into the Constitution itself, and there it lies now, side by side with the provision which forbids it. But the injection served only for that occasion; it did not abrogate the prohibition. Bills of pains and penalties are as odious as ever. It is the duty of every public man and every private citizen to hate such things with all his mind and heart and strength, as I hope you do.

Coming back to the original and fundamental proposition that you have no authority to legislate about marriage in a Territory, you will ask what then are we to do with polygamy? It is a bad thing and a false religion that allows it. But the people of Utah have as good a right to their false religion as you have to your true one. Then you add that it is not a religious error merely, but a crime which ought to be extirpated by the sword of the civil magistrate. That is also conceded. But those people have a civil government of their own, which is as wrong-headed as their Church. Both are free to do evil on this and kindred subjects if they please, and they are neither of them answerable to you. That brings you to the

end of your string. You are compelled to treat this offense as you treat others in the States and in the Territories—that is, leave it to be dealt with by the powers that are ordained of God or by God Himself, who will in due time become the minister of His own justice.